(3)

No. 03-1234

Supreme Court, U.S.
FILED
MAY 14 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
AND LAFOND EXPRESS, INC., on behalf
of themselves and all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN DEPARTMENT OF TREASURY,
MICHIGAN DEPARTMENT OF COMMERCE,
AND THE STATE OF MICHIGAN,

Respondents.

**On Petition For A Writ Of Certiorari
To The Michigan Court Of Appeals**

PETITIONERS' REPLY BRIEF

JAMES H. HANSON*
ANDREW K. LIGHT
LYNNE D. LIDKE
SCOPELITIS, GARVIN, LIGHT &
HANSON, P.C.
10 W. Market St., Suite 1500
Indianapolis, IN 46204
(317) 637-1777

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

A. The Illusory "Regulatory Fee" Label Does Not Yield An Answer To The Preemption Question Posed 1

B. The Interstate Decal Fee's Practical Impact, Not Its Name Or Its Purpose, Decides The Outcome Of This Controversy 5

C. The Importance Of The Issue Presented Here Should Not Be Trivialized..... 8

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 5

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 8, 9, 10

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) 1

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 3

City of Detroit v. Murray Corp., 355 U.S. 489 (1958) 3

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 6

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 5

Hines v. Davidowitz, 312 U.S. 52 (1941) 5

Jefferson County v. Acker, 527 U.S. 423 (1999) 3

Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926) 8

New York v. FERC, 535 U.S. 1 (2003) 1

Perez v. Campbell, 402 U.S. 637 (1971) 5, 6

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 1

United States v. Locke, 529 U.S. 89 (2000) 1

Xerox Corp. v. County of Harris, 459 U.S. 145 (1982) 4

STATUTES AND REGULATIONS

49 U.S.C. § 11506(c)(2)(B)(iv)(II) (1994 ed.) 7

49 U.S.C. § 14504(c)(2)(B)(iii) (2000 ed.) 3

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 14504(c)(2)(C) (2000 ed.) 5

Mich. Comp. Laws Ann. § 478.6 (West 2002) 4

Mich. Comp. Laws Ann. § 478.7(1) (West 2002) 2

Mich. Comp. Laws Ann. § 478.7(5) (West 2002) 4

MISCELLANEOUS

H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679 7

H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923 7

PETITIONERS' REPLY BRIEF

Choosing to disregard this Court's recent clarification that no presumption against preemption applies to matters "inherently federal in character"[1] or to state regulation in areas with "a history of significant federal presence,"[2] Respondents' brief fails in its attempt to trivialize the importance of the ruling below. Neither a meaningless registration/regulatory fee distinction nor selective application of the $100 per-vehicle Interstate Decal Fee to Michigan-plated trucks lessens the fee's practical impact upon fee-paying interstate carriers. Thus, Respondents' arguments do not rescue the fee from Congress's express preemptive net or diminish the real threat the Michigan decision poses to interstate truckers across the nation. Further review is plainly warranted.

A. The Illusory "Regulatory Fee" Label Does Not Yield An Answer To The Preemption Question Posed

In an exercise in misdirection and pointless semantics, Respondents insist that only "registration" fees are preempted by the Single State Registration System ("SSRS") and that the Interstate Decal Fee is saved from

---

[1] *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-348 (2001).

[2] *United States v. Locke*, 529 U.S. 89, 108 (2000). Respondents advance *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) in support of "a general presumption against federal preemption," Opp. 18, but *Rice* was expressly rejected as standing for that proposition in *Locke*, 529 U.S. at 108. Curiously, Respondents also cite *New York v. FERC*, 535 U.S. 1 (2003), which involved defining the proper scope of a federal agency's power and plainly has no bearing upon the question in this case.

preemption because it is a "regulatory" fee, not a registration fee. This now-familiar refrain, borrowed as it is from the Michigan Court of Appeals decision, evades the legal question presented. The question before this Court is whether the label attached to the Interstate Decal Fee or even the use to which its revenues are put can legally distinguish it from the per-vehicle fees Congress capped at $10 under the SSRS and the predecessor "bingo card" law. The unmistakable answer to that question is "no."

Remarkably, Respondents claim that payment of the $100 Interstate Decal Fee to the Michigan Public Service Commission ("PSC") is unlike payment of the $10 SSRS fee because it is "not a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured or that it has a named agent for service of process." Opp. 6. In fact, just the opposite is true. *Every* interstate carrier, regardless of the state in which it plates its vehicles, is prohibited from engaging in the interstate transportation of property in Michigan "without first having registered with the [PSC] and paid the required registration and vehicle fees." Mich. Comp. Laws Ann. § 478.7(1) (West 2002). The way *all* interstate carriers register with the PSC is through the SSRS, which requires *each* of them to do the same things to prove the lawfulness of their operations except that, under Michigan law, Michigan-plated carriers pay $90 per truck more for registration.

Thus, prior to the 1994 implementation of the SSRS, Michigan-plated carriers paying $100 per truck – just like carriers plated elsewhere but paying $10 per truck – were required to file proof of their federal authority, register their motor vehicles, submit evidence of insurance, and

identify their agent for service of process. Since 1994, those same Michigan-plated carriers – just like carriers that purchase their license plates elsewhere – must *still* file proof of federal authority, submit evidence of insurance, and name their agent for service of process. The only difference between the two carriers is that Michigan's SSRS form directs the Michigan-plated carrier to pay $100, instead of $10, per vehicle and to fill out another form identifying its trucks by make, model, and serial number to obtain a decal for each – even though the SSRS expressly prohibits decal requirements and the registration or identification of specific vehicles operated by the carrier. 49 U.S.C. § 14504(c)(2)(B)(iii) (2000 ed.).

In short, Respondents cannot at once acknowledge that Congress has "preempt[ed] a State from charging more than $10 to register and operate within the borders of that State,"[3] yet disregard the fact that Michigan-plated interstate carriers pay $100 per truck to register and operate within Michigan's borders while other carriers pay $10 per truck for the exact same privilege. Michigan-plated carriers "register" with Michigan for the price of $100, whether Michigan calls the assessed fee a "regulatory" fee or not. *See Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 164 n.3 (1980) (transaction privilege tax was preempted by Indian trader statutes "regardless of the label" placed upon it). *See also Jefferson County v. Acker*, 527 U.S. 423, 439 (1999) ("practical impact, not the State's name tag," determines whether tax violates Public Salary Tax Act); *City of Detroit*

[3] Opp. 19.

v. Murray Corp., 355 U.S. 489, 492 (1958) (in determining constitutionality of a tax, "we must look through form and behind labels to substance").

Nor can the so-called "regulatory" use to which its revenues are put distinguish the Interstate Decal Fee from the $10 SSRS fee Michigan otherwise collects. Respondents emphasize witness testimony that the Interstate Decal Fee supports a whole host of laws governing commercial motor vehicles and carriers after it is "placed to the credit of the [PSC]" and "appropriated . . . in such proportions as the legislature may determine." Mich. Comp. Laws Ann. § 478.6 (West 2002). However, Respondents conveniently ignore that the $10 SSRS fee (along with every other fee collected by the PSC) is *also* "placed to the credit of the [PSC]" and, as Respondents' own witness explains, combined with all other motor carrier fee revenue for appropriation to the *same* "regulatory" agencies for the *same* "regulatory" use Respondents so insistently assign to the Intestate Decal Fee alone.[4] The $10 SSRS fee is just as "regulatory" in nature as the $100 Interstate Decal Fee, and the Interstate Decal Fee serves no more "regulatory" purpose than any other fee collected by the PSC from any motor carrier in Michigan.

Therefore, whatever differences there may be between the $10 SSRS fee and the $100 Interstate Decal Fee, "they are distinctions without a legal difference." *Xerox Corp. v. County of Harris*, 459 U.S. 145, 154 (1982). The only real

[4] Opp. App. 8b-14b. In addition, under Mich. Comp. Laws Ann. § 478.7(5), a portion of the SSRS fee is designated for deposit in the Michigan Truck Safety Fund for use in "regulatory" endeavors. Opp. App. 13b.

difference between the two fees is $90, and it is that distinction that makes the Interstate Decal Fee incompatible with Congress's proclamation that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C) (2000 ed.).

B. The Interstate Decal Fee's Practical Impact, Not Its Name Or Its Purpose, Determines the Outcome Of This Controversy

It makes no difference that Congress did not make specific reference to "regulatory fees" in adopting the SSRS or its predecessor "bingo card" program. State law yields under Supremacy Clause analysis if it "stands as an obstacle" to full implementation of the federal law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or otherwise frustrates the accomplishment of a federal objective. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Thus, by way of example only, *Perez v. Campbell*, 402 U.S. 637 (1971) did not require an express reference to state highway safety laws before construing the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors. Nor did federal law make express reference to state registration standards for aliens when the Federal Alien Registration Act was deemed preemptive of state registration laws in *Hines*, *supra*. Whether or not Congress has made an express preemptive pronouncement on a particular topic, state regulation must yield to the extent it actually conflicts with federal law. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648-649 (1990).

Furthermore, it matters not whether the Michigan legislature intended by its adoption of the Interstate Decal Fee to serve some purpose other than to frustrate the goals of the SSRS. Over three decades ago, this Court declared that it could no longer "adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing the law had some purpose in mind other than one of frustration." *Perez*, 402 U.S. at 651-52. Differently stated, "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992). Accordingly, the "key question" is "at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted." *Id.*

That the Interstate Decal Fee blatantly interferes with and frustrates Congress's purpose in limiting per-vehicle fees imposed on interstate carriers cannot be seriously debated. Every Michigan-plated motor carrier seeking to engage in interstate trade on Michigan's highways must pay the PSC $100 per truck for the privilege of conducting its business. The fee, therefore, stands as a $100 obstacle for each truck the interstate motor carrier hopes to operate in and out of the state even though Congress declared that no more than $10 should be paid to clear the roadway for each such truck. Under such circumstances, the Interstate Decal Fee unquestionably frustrates the purpose of Congress when, through implementation of the original "bingo card" program, it sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" and to establish *uniform* registration requirements imposed by state regulatory

commissions. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. Similarly, the Interstate Decal Fee interferes with Congress's goal in enacting the SSRS, which was to establish "a fee system . . . that [would] minimize the costs of complying with the registration system," 49 U.S.C. § 11506(c)(2)(B)(iv)(II) (1994 ed.), and "benefit the interstate carriers by eliminating unnecessary compliance burdens" so that consumers would also profit from cost savings. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817.

No evidence was required for the lower courts to reach such conclusions. Nor was evidence required to rebut Respondents' new-found contention that the Interstate Decal Fee is somehow justified by "actual vehicular 'presence' in Michigan" allegedly evidenced by "commercially license plating the fee paying vehicle in [Michigan]." Opp. 17. Setting aside for the moment that the Michigan Court of Appeals made no mention of *any* "vehicular presence" justification for the Interstate Decal Fee, Petitioners previously demonstrated that Michigan may be the base-plating state pursuant to the International Registration Plan ("IRP") under circumstances that have little to do with a "regulatory presence" within the state's borders.[5]

In any event, whatever Michigan's professed purpose for the Interstate Decal Fee might be, that purpose is no

[5] Pet. 23-24. Despite its heavy dose of sarcasm (Opp. 21), Respondents' brief does not dispute the inherent truth of our point that small Michigan-based carriers imposing little regulatory burden upon the State cannot avoid the fee because they have no out-of-state terminals while large carriers with a significant Michigan presence and a terminal out of state can escape fee payment altogether.

more determinative than the fee's name. Preemption analysis turns not on whether federal and state laws "are aimed at distinct and different evils," but whether they "operate upon the same object." *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926). In this case, the object upon which federal and state law both operate is the same interstate truck, and the Interstate Decal Fee's application to *any* interstate truck – paid as it is for the mere privilege of traveling upon the state's highways – does not square with the $10 per-vehicle fee cap imposed by federal law. The Interstate Decal Fee must therefore yield to Congress's express preemptive strike.

C. The Importance Of The Issue Presented Here Should Not Be Trivialized

Notwithstanding their characterization of our position as "erroneous, speculative and exaggerated," Opp. 18, Respondents' argument *acknowledges* that the issue presented here is a potentially recurring one of great practical importance. Both the Michigan Court of Appeals and Respondents maintain that, because the SSRS does not prohibit flat per-vehicle "regulatory" fees, Michigan may charge Petitioners $100 per vehicle every year for whatever "regulatory" purpose it desires. That rationale, if true, proves our point that the Michigan court ruling opens the floodgates for other States to assess any and all per-vehicle "regulatory" fees they see fit to impose in any amount for any "regulatory" reason. The adverse impact upon interstate trucking interests, in that event, could be monumental.

Seventeen years ago in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), this Court recognized that

plating fees imposed under the IRP and fuel taxes assessed under the International Fuel Tax Agreement, both of which are apportioned based upon a motor vehicle's mileage within a state, readily satisfy dormant Commerce Clause jurisprudence. *Id.* at 282-283. In contrast, however, flat unapportioned per-vehicle fees imposed on interstate carriers

> penalize some travel within the free trade area. . . . [T]heir inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State. . . . If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284. *Scheiner* thus teaches that States requiring "regulatory" revenue must collect it on an apportioned basis that measures the fee-payer's use of State facilities because a flat unapportioned per-vehicle fee "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287.

The words of *Scheiner* echo back at interstate truckers when they hear Respondents' hollow claim that any State is free to impose a flat per-vehicle "regulatory fee" in any amount it chooses. Congress, as the federal authority with preeminent power over matters involving interstate commerce and interstate trucking in particular, saw fit to authorize flat per-vehicle fees of no more than $10 and declared anything higher than that charge to be a burden upon interstate commerce. Nevertheless, Respondents' position and the lower court ruling both demonstrate that the SSRS may be read by state regulatory commissions as

Congressional *authority* for flat, per-vehicle "regulatory fees" in any amount, and, if so, interstate carriers will be required to revisit and fight again the same flat fee battles they fought so hard to win in *Scheiner*. The Michigan court's ruling, therefore, should not be permitted to stand.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES H. HANSON*
ANDREW K. LIGHT
LYNNE D. LIDKE
SCOPELITIS, GARVIN, LIGHT
& HANSON, P.C.
10 W. Market St., Suite 1500
Indianapolis, IN 46204
(317) 637-1777

Counsel of Record